

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket 96-45
Universal Service	)	
	)	DA 03-2329
<b>NPCR, INC. d/b/a NEXTEL PARTNERS</b>	)	
	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the State of New York	)	
_____	)	

**REPLY COMMENTS OF  
NEXTEL PARTNERS**

NPCR, INC. d/b/a NEXTEL PARTNERS

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## SUMMARY

Nextel Partners has demonstrated in its Petition for Designation that it provides, or will provide upon designation as an Eligible Telecommunications Carrier (“ETC”) all of the “supported services” required by the Commission’s Rules throughout its designated service area. Nextel Partners has also shown that a grant of its Petition is in the public interest for the affected rural telephone company (“RTC”) study areas, because it would result in the benefits of additional competition, innovative services and technology and enhanced consumer choice for those RTC study areas.

The commenters in this proceeding do not present any evidence either that Nextel will not or cannot provide the supported services throughout its designated service area upon designation, or that the public interest will not benefit from granting Nextel Partners ETC status.

The commenters’ various claims that granting Nextel Partners ETC status in New York will not benefit the public interest are speculative and unsupported by empirical data or legal precedent. Existing Commission policies and precedent favor increased consumer choice and access to technology. The commenters’ arguments opposing Nextel Partners’ Petition run contrary to the goals of universal service and are designed primarily to protect the franchises of rural ILECs at the expense of depriving rural consumers in New York of superior service and an enhanced menu of choices.

Many of the issues addressed by the commenters are larger questions of national policy (such as the potential for affecting the overall size of the universal service fund) that exceed the scope of this proceeding, which is concerned with Nextel Partners’ eligibility for ETC status in New York. The commenters have not, however, provided evidence to support their overarching policy concerns, and in any event are not entitled to have these issues addressed in this

proceeding. Nor do the policy issues discussed by the commenters merit a stay of this proceeding, or the imposition of any further delay in granting Nextel Partners ETC status in New York. The Commission must address Nextel Partners' Petition based on existing law and precedent and Nextel Partners will be subject to any changes affecting ETCs that may be promulgated in the future.

In sum, nothing submitted by any commenter in this proceeding has refuted or meaningfully called into question any of the substantive showings made by Nextel Partners in its Petition for Designation. Accordingly, Nextel Partners requests that the Commission grant its Petition without further delay.

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**REPLY COMMENTS OF  
NPCR, INC. d/b/a NEXTEL PARTNERS**

NPCR, Inc. d/b/a Nextel Partners (“Nextel Partners”), by its undersigned counsel hereby submits its “Reply Comments” in the above-captioned proceeding in response to comments filed by Frontier Communications (“Frontier”), the New York State Telecommunications Association, Inc. (“NYSTA”), the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) and Verizon (collectively, the “Commenters”).<sup>1</sup>

Nextel Partners’ April 3, 2003 Petition for Designation (the “Petition”) as an Eligible Telecommunications Carrier (“ETC”) demonstrated that Nextel Partners provides, or upon designation will provide, in the Designated Areas<sup>2</sup> of the State of New

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<sup>1</sup> See Public Notice, *Wireline Competition Bureau Seeks Comment on NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of New York*, CC Docket No. 96-45, DA 03-2329 (rel. July 16, 2003); and Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, 68 Fed. Reg. 46644 (Aug. 6, 2003) (Reply comments due September 2, 2003.)

<sup>2</sup> In its Petition, Nextel Partners refers to the non-rural ILEC wire centers and rural telephone company (“RTC”) study areas in which it seeks ETC status as the “Designated Areas.” Nextel Partners has determined not to seek ETC designation in the RTC study areas set forth on **Exhibit 1** hereto and therefore withdraws these study areas from

York all of the services and functionalities required of an ETC pursuant to applicable law, and that the public interest would be served by designating Nextel Partners as an ETC.

The Commenters raise a variety of issues, none of which constitutes any legal, factual or policy basis for the denial of Nextel Partners' ETC status. Accordingly, the Commission should grant Nextel Partners ETC status in the Designated Areas of the State of New York without further delay.

**A. Designation of Nextel Partners as an ETC Will Promote the Goals of Universal Service**

The Commission has determined that “[d]esignation of competitive ETCs promotes competition *and* benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies.”<sup>3</sup> The Commission’s Universal Service Rules are based on the fundamental assumptions that residents of rural communities will benefit from competition in telecommunications services and access to the same technologies and services that are available to residents of urban areas. In fact, this central goal is stated outright in the Act itself:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that

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consideration in this proceeding. In addition, with respect to the non-rural SAC 155130 (Verizon-New York), Nextel Partners has determined that it will seek ETC designation in only the wire centers set forth on **Exhibit 2** hereto, and withdraws all other wire centers in SAC 155130.

<sup>3</sup> *In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48 at ¶ 15 (2000) (“*Western Wireless Wyoming Order*”) (emphasis supplied).

are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>4</sup>

The burden is on parties opposing designation to refute Nextel Partners' threshold showing that its Petition for Designation in New York complies with these clearly-stated statutory goals.<sup>5</sup> As demonstrated herein, the Commenters have not met that burden.

For example, OPASTCO broadly asserts that Nextel Partners' petition "is based entirely on vague generalities regarding the generic benefits of competition."<sup>6</sup> OPASTCO, however, provides no empirical evidence to refute the showings made by Nextel Partners in its Petition; nor does OPASTCO otherwise demonstrate that designation of Nextel Partners as an ETC will not advance the Commission's pro-competitive, consumer choice, and advanced technology universal service goals.<sup>7</sup>

**B. Nextel Partners Need Not Provide Ubiquitous Service to its Designated Service Area as a Precondition to Designation as an ETC**

NYSTA contends that Nextel Partners must provide the required services throughout the Designated Areas immediately upon designation, or Nextel Partners' Petition should be dismissed.<sup>8</sup> However, contrary to this assertion, Nextel Partners is *not* required to provide ubiquitous service as a precondition for designation as an ETC.

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<sup>4</sup> 47 U.S.C. § 254(b)(3).

<sup>5</sup> See, e.g., *Western Wireless Wyoming Order* at ¶ 16; *In the Matter of Federal-State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In the State of Alabama*, 17 FCC Rcd 23532 at ¶¶ 22 and 26 (2002) ("RCC Order").

<sup>6</sup> OPASTCO Comments at 5.

<sup>7</sup> Indeed, OPASTCO concedes that its comments "are not intended to debate the many nuances of considering the public interest when evaluating an ETC application." OPASTCO Comments at 5.

<sup>8</sup> NYSTA Comments at 6.

Under clearly-established precedent, there is no requirement that Nextel Partners must have in place, in advance of ETC designation, the necessary infrastructure to provide service to *all* potential customers in its designated service area.<sup>9</sup> A primary purpose of the Universal Service Fund (“USF”) is to promote the *growth* of telecommunications services in high cost areas.<sup>10</sup> The Commission has recognized that to require ubiquitous service of a telecommunications carrier prior to ETC designation is to misconstrue the purpose of the USF and would prevent the designation of additional ETCs.<sup>11</sup>

As recently observed by the Commission:

We believe that interpreting section 214(e)(1) to require the provision of service throughout the service areas prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carrier to provide telecommunications service in violation of section 253(a) of the Act...that such an interpretation ... is not competitively neutral ... [and] that to require the provision of service throughout the service area prior to designation effectively preclude designation of new entrants as ETCs in violation of the intent of Congress.<sup>12</sup>

An ETC is only required to respond to a “reasonable request” to furnish communications service within its designated service territory.<sup>13</sup> NYSTA’s attempt to

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<sup>9</sup> See *RCC Order* at ¶ 16.

<sup>10</sup> See Declaratory Ruling, *In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168 (2002) (“*South Dakota Declaratory Ruling*”) at ¶¶ 12, 14.

<sup>11</sup> *Id.* at ¶¶ 10, 12.

<sup>12</sup> *South Dakota Declaratory Ruling* at ¶ 2.

<sup>13</sup> See, e.g., *South Dakota Declaratory Ruling* at ¶ 17; see also 47 U.S.C. § 201(a).



hold Nextel Partners to a higher “ubiquitous service” standard is contrary to existing policy.

**C. Nextel Partners Has the Requisite Capability and Commitment to Provide Service Throughout the Designated Areas**

Nextel Partners’ Petition clearly demonstrates that Nextel Partners has both the “capability and commitment to provide universal service” in the Designated Areas. This showing satisfies the Commission’s requirements for designation of an ETC.<sup>14</sup> As shown on the coverage map submitted with Nextel Partners’ Petition, Nextel Partners already provides wireless telecommunications service in much of rural New York.<sup>15</sup> Upon designation as an ETC, and consistent with applicable law, Nextel Partners will furnish “communications services upon reasonable request”<sup>16</sup> within the Designated Areas.

NYSTA contends that Nextel Partners’ Petition does not explain how it would provide service to “low population, high cost areas” in the Designated Areas, and claims that it is “unable to confirm” that Nextel Partners provides service to certain zip codes within specified RTC territories.<sup>17</sup> Thus, NYSTA concludes that Nextel Partners’ Petition is deficient.

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<sup>14</sup> See *South Dakota Declaratory Ruling* at ¶ 17; see also *RCC Order* at ¶ 16 (“[a] new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service.”)

<sup>15</sup> Nextel Partners’ coverage map set forth in **Attachment 3** to its Petition reflects the many Economic Area (“EA”) and site-based licenses pursuant to which Nextel Partners offers its services in New York. The Commission’s ULS database contains records of these licenses, which are held by wholly-owned subsidiaries of Nextel Partners Operating Corp., the corporate parent of NPCR, Inc.

<sup>16</sup> 47 U.S.C. § 201(a).

<sup>17</sup> NYSTA Comments at 4-5.

However, NYSTA's conclusion is faulty. As noted, Nextel Partners is not required to demonstrate that it covers every square inch – or every zip code -- in each RTC study area for which it seeks designation as an ETC. Likewise, NYSTA's argument that Nextel Partners' Petition is deficient because it does not include specific details as to how Nextel Partners intends to upgrade and extend its network infrastructure in New York lacks merit. A petition for ETC designation need not include details regarding how the petitioner plans to upgrade and expand its network.<sup>18</sup>

As demonstrated in Nextel Partners' Petition, Nextel Partners is *already* doing business in the Designated Areas, and has financed the build out of its infrastructure so far without any USF support. Nextel Partner's presence in the Designated Areas is a compelling indication of its commitment to serve consumers located in high cost and rural portions of New York. The receipt of USF support will facilitate upgrades and expansion of Nextel Partners' network, further benefiting consumers in these areas. Nextel Partners is required by applicable law to utilize its USF support in a manner consistent with the Act, *viz.*, *only for* the provision, maintenance, and upgrading of facilities and services for which the support is intended. In fact, Nextel Partners has already certified to both the Commission and to USAC that it will meet this requirement in the State of New York.<sup>19</sup>

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<sup>18</sup> See 47 U.S.C. § 214(e)(6); see also 47 C.F.R. § 54.201 and *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, 12 FCC Rcd 22947 (1997) ("*Procedures for FCC Designation of Eligible Telecommunications Carriers*").

<sup>19</sup> See Petition, **Attachment 4** (Nextel Partners' certifications as to use of high cost funds).

Nevertheless, NYSTA's attempt to criticize Nextel Partners' existing coverage patterns is without merit.<sup>20</sup> However, Nextel Partners' present coverage plan has been designed and implemented based on customer expectations, demands and feedback. Since Nextel Partners, unlike wireline ILECs, provides mobile communications services, a predominant expectation of Nextel Partners' customers is that they will be able to use their phones when traveling on the highways -- portions of the rural study areas that are *not* comparably served by the wireline carrier.

In sum, Nextel Partners has demonstrated that it has the requisite "capability and commitment" to provide service throughout the Designated Areas,<sup>21</sup> which will result in significant benefits to consumers in the State of New York.

**D. Designation of Nextel Partners as an ETC is in the Public Interest**

The record in this proceeding clearly demonstrates that Nextel Partners' designation as an ETC will benefit New York telecommunications users. These consumers are the focus of the goals of universal service.<sup>22</sup> Under the Commission's universal service policies, high cost and low income consumers in New York State should be afforded the same opportunities as other consumers to choose a telecommunications carrier, to access new technologies, and to select from a menu of

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<sup>20</sup> See NYSTA Comments at 6.

<sup>21</sup> See *In the Matter of the Federal State Joint Board on Universal Service; Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, 17 FCC Rcd 24493 (2002) ("*Cellular South Order*") at ¶ 15.

<sup>22</sup> See *Alenco Communications Inc. et al. v. FCC*, 201 F.3d 608, 620 (5<sup>th</sup> Cir. 2000) ("*Alenco Communications*").

innovative services.<sup>23</sup> Nextel Partners' designation as an ETC in the Designated Areas would unquestionably advance these universal service goals in the State of New York.<sup>24</sup>

OPASTCO, Frontier and NYSTA all maintain that designation of Nextel Partners as an ETC in New York will not benefit the public interest.<sup>25</sup> These Commenters raise a number of meritless arguments in an attempt to justify their positions. Frontier contends that designation of Nextel Partners as an ETC will not enhance competition, because wireline and wireless service providers do not compete.<sup>26</sup> This argument runs contrary to well-established Commission precedent that clearly and consistently recognizes the benefits to competition of designating wireless ETCs in RTC study areas.<sup>27</sup> Frontier has

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<sup>23</sup> See *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 at ¶¶ 4, 21 (1997) ("Universal Service Order"). See also *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214 (e) and PUC SUBST. R. 26.418*, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168 (Texas Public Utility Commission, October 30, 2000) ("*Texas PUC Order*") at 2.

<sup>24</sup> See, e.g., *Western Wireless Wyoming Order* at ¶15 ("[d]esignation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies.").

<sup>25</sup> Frontier asserts that Nextel Partners' Petition should be subjected to a "rigorous" public interest test. As demonstrated herein, however, designation of Nextel Partners as an ETC in the Designated Areas is clearly in the interest of the public, under the standards established by Congress and the Commission. Moreover, Frontier does not explain why it is appropriate and legal that Nextel Partners should be treated differently than any other similarly-situated applicant for ETC status.

<sup>26</sup> Frontier Comments at 6.

<sup>27</sup> See, e.g., *In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133 (2001) ("*Western Wireless Pine Ridge Order*") at ¶ 8 (we find that the designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas); *South Dakota Declaratory*

not presented any empirical evidence to support its assertion, and its contention does not warrant serious consideration.

Frontier's position that it does not compete with Nextel Partners, based solely on the fact that Nextel Partners does not offer wireline services, is no more than a thinly-veiled attempt to exclude all wireless carriers from ETC status<sup>28</sup> in contravention of the Commission's policy of technological neutrality.<sup>29</sup> At any rate, the Commission has already determined that wireless providers should be designated as ETCs, stating, "We agree with the Joint Board's analysis and recommendation that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under Section 214(e)(1)."<sup>30</sup>

Frontier's admission that Nextel Partners' service is "complementary" to wireline services entirely undermines Frontier's claim that designation of Nextel Partners as an ETC is not in the public interest. By characterizing Nextel Partners' wireless services as "complementary," Frontier concedes that Nextel Partners supplies telecommunications services that Frontier's customers – and other rural consumers -- would otherwise lack. The addition of Nextel Partners' "complementary" services increases consumers' menu

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*Ruling* at ¶ 16 (designating wireless carriers that already provided services in RTC study areas as ETCs); *RCC Order* at ¶¶ 22-25 (finding that designation of wireless carrier RCC Holdings will bring competition and innovative service to rural consumers).

<sup>28</sup> OPASTCO also seeks in its comments to block wireless ETCs from designation as ETCs, in contravention of the Commission's technology-neutral policies.

<sup>29</sup> See *Universal Service Order* at ¶ 145 ("any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214(e)(1)...any wholesale exclusion of a class of carriers by the Commission would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act").

<sup>30</sup> *Id.* at ¶ 145.

of choices, provides new and innovative services, and helps to keep rates “just and affordable.”

Wireless carriers such as Nextel Partners also add the element of mobility to the provision of universal service, a valuable option that the incumbent wireline LEC cannot match. This essential difference is particularly beneficial to consumers in rural areas, including remote roads and highways, where wireline telephones are more widely spaced than in concentrated urban areas. In addition, Nextel Partners typically offers a much larger local calling area than the RTCs it competes with, and this is a significant benefit to consumers.<sup>31</sup> All of the foregoing benefits are in the public interest and advance the goals of universal service.<sup>32</sup>

Frontier argues that designation of Nextel Partners as an ETC will not bring any additional competitive benefits to the public, because Nextel Partners is not a *new* market entrant.<sup>33</sup> This argument, however, is not persuasive, because the Commission does not require that an ETC applicant be new to the study area.<sup>34</sup> Frontier’s additional arguments concerning “cream-skimming”<sup>35</sup> and “windfall profits”<sup>36</sup> are similarly unconvincing.

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<sup>31</sup> Moreover, unlike some other wireless carriers, Nextel Partners does not impose any “roaming” charges for the use of its nationwide service.

<sup>32</sup> See, e.g., *RCC Order* at ¶¶ 23-24.

<sup>33</sup> See Frontier Comments at 4, 6.

<sup>34</sup> See *Western Wireless Pine Ridge Order* at ¶ 8; *South Dakota Declaratory Ruling* at ¶ 16 (designating wireless carriers that already provided services in study areas as ETCs).

<sup>35</sup> Frontier’s “cream-skimming” argument is that, upon designation as an ETC Nextel Partners will receive an excessive amount of universal service funds because a wireless customer’s eligibility for funding is based on the customer’s billing address. See Frontier Comments at 7. However, this issue exceeds the scope of the instant proceeding,

NYSTA claims that no public interest gains will be realized because the addition of Nextel Partners as an ETC will not increase the “penetration rate” of subscribers, including Lifeline subscribers.<sup>37</sup> This assertion is entirely speculative and unsupported by any empirical data. Moreover, if the “penetration rate” were the critical factor to be considered in the public interest analysis, rural and low-income consumers would rarely, if ever, have access to an expanded menu of service options, new technology, mobility, expanded local calling areas and other benefits that the addition of a wireless ETC can bring. As NYSTA itself acknowledges, the national average “penetration rate” of local exchange carriers is *in excess of 95%*.<sup>38</sup>

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which is only concerned with Nextel Partner’s eligibility for ETC status. *See, e.g., South Dakota Declaratory Ruling* at ¶ 2. In addition, the Commission has adopted the recommendation of the Rural Task Force that “a wireless mobile carrier use a customer’s location . . . for purposes of receiving high-cost universal service support.” *In the Matter of Federal-State Joint Board on Universal Service: Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 at ¶ 180 (2001) (“MAG Order”).

<sup>36</sup> Frontier’s “windfall profits” argument asserts, without any foundation, that the addition of USF subsidies to a CMRS carrier’s financial structure will result in an unanticipated “windfall profit.” *See* Frontier Comments at 8. But there is no empirical basis whatsoever for this claim. Moreover, it is beyond the scope of this proceeding, which concerns Nextel Partners’ Petition for Designation, rather than the mechanism for computing USF payments to ETCs.

<sup>37</sup> *See* NYSTA Comments at 7.

<sup>38</sup> NYSTA’s argument is also contrary to established Commission policy. The Commission has determined that it promotes the goals of universal service to provide high cost subsidies to a wireless ETC in an RTC study area even when the wireless carrier serves customers that are also served by the wireline carrier. *See Universal Service Order* at ¶ 146.

Yet another argument raised by NYSTA is that Nextel Partners' Lifeline rate would be "too expensive" for New York Lifeline subscribers. However, this supposition is entirely unfounded, since Nextel Partners has not yet proposed its Lifeline offering for the state. The addition of Nextel Partners as an ETC in RTC study areas in New York will afford low-income customers a choice of a wireless universal service provider for the first time – and this choice will be at the discretion of these consumers, and not the incumbent LEC.

NYSTA also complains that Nextel Partners should not be designated as an ETC because its service inherently includes vertical switch features and other advanced services, whereas, according to NYSTA, incumbent LECs tend not to include these features in their basic service, but instead impose additional, recurring charges for such features.<sup>39</sup> NYSTA asserts that Nextel Partners' inclusion of advanced technological features in its service will cause USF support to be misdirected to the subsidy of unsupported services. However, NYSTA does not point to anything in the Commission's rules or case precedent to support its claim that an ETC may not include advanced technological features in its service offerings.<sup>40</sup> In fact, the Commission has determined that use of USF support "to invest in infrastructure capable of providing advanced services does not violate Section 254(e)."<sup>41</sup>

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<sup>39</sup> See NYSTA Comments at 10.

<sup>40</sup> Likewise, the Commission's Rules pertaining to the Lifeline program do not contain any prohibitions preventing the inclusion of advanced features to complement the basic service provided to subscribers. Instead, Rule 54.401, which defines Lifeline, is phrased in terms of what Lifeline must *include*, but does not specify any exclusions. See 47 C.F.R. § 54.401 (2002).

<sup>41</sup> *Cellular South Order* at ¶ 20.



NYSTA further claims that the designation of Nextel Partners will create an “unlevel” playing field because (i) CMRS carriers are not required to offer equal access; and (ii) if granted ETC status by the Commission, Nextel Partners would only have to self-certify annually its use of high cost subsidies to USAC and the Commission, rather than to the New York State Public Service Commission (“NYSPSC”).<sup>42</sup> Neither of these arguments has merit. There is no requirement in the Commission’s Rules that a wireless ETC applicant must offer equal access in order to be designated. In fact, the Commission has made it clear that wireless applicants may not be denied ETC status on the basis that they do not offer equal access.<sup>43</sup> Finally, the suggestion that a carrier’s self-certification of annual USF subsidy use to USAC and the Commission is any less reliable or burdensome than submitting precisely the same certification to the NYSPSC is absurd.

**E. The Policy Arguments Raised by the Commenters Are Beyond the Scope of this Proceeding, and Fail to Justify a Stay**

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This proceeding is solely concerned with the question of Nextel Partners’ qualifications to be granted ETC status, and is not a general forum for the consideration of national policies regarding universal service. To the extent that the arguments raised by the Commenters seek to address larger questions of policy, they exceed the scope of this proceeding and cannot be addressed in the context of determining Nextel Partners’

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<sup>42</sup> See NYSTA Comments at 9.

<sup>43</sup> See *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 140801 at ¶ 1 (2002).

qualification for ETC status.<sup>44</sup> Nor does the existence of extrinsic policy issues justify a stay of this proceeding, or the imposition of delay in the consideration of Nextel Partners' Petition.<sup>45</sup>

The Commenters nevertheless request that the Commission stay consideration of Nextel Partners' Petition pending the resolution of policy issues that exceed the scope of this proceeding. Verizon suggests that additional ETC designations in non-rural areas threaten the form of access charges established by the CALLS Order in CC Docket Nos. 96-262 and 94-1.<sup>46</sup> OPASTCO, NYSTA and Frontier propose that the Commission consider staying the instant proceeding pending resolution of high-cost support and other USF issues presently before the Federal-State Joint Board<sup>47</sup>

The possibility of a future change in rules generally affecting the designation of ETCs and/or the distribution of Universal Service Funds cannot justify staying Nextel Partners' request for designation as an ETC in New York. The Commission is bound to

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<sup>44</sup> See, e.g., *RCC Order* at ¶ 32 ("We recognize that these parties raise important issues regarding universal service high-cost support. We find, however, that these concerns are beyond the scope of this Order, which considers whether to designate a particular carrier as an ETC.")

<sup>45</sup> OPASTCO claims that there is "precedent" for staying ETC designations, referring to a 1993 Order from the Commission that imposed an indexed cap on USF support for local exchange carriers on an interim basis. See OPASTCO Comments at 4 n.9; see also *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 9 FCC Rcd 303 (1993). This assertion, however is fatally flawed, since the cited case, which predates the 1996 Act, neither stays any Commission proceeding, nor affects the eligibility of any ETC applicant, but merely adjusts the funding for ILECs on a temporary basis.

<sup>46</sup> Verizon Comments at ¶ 1.

<sup>47</sup> See OPASTCO Comments at 2; Frontier Comments at 9; NYSTA Comments at 11-12.

abide by *existing* rules and policies in all proceedings.<sup>48</sup> The Commission is committed to resolving ETC designation petitions in a six-month time frame, recognizing that “excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas.”<sup>49</sup> Staying the instant proceeding would “unnecessarily delay resolution of this matter well beyond the Commission’s informal [six month] commitment.”<sup>50</sup>

Moreover, as a practical matter, since Nextel Partners and all other ETC petitioners must in any event comply with Commission Orders that adopt Joint Board recommendations, there is no logic in holding ETC designation proceedings in abeyance pending the outcome of Joint Board proceedings. This was clearly recognized by the Commission in a recent Order in Docket 96-45, in which the Commission stated:

We note that the outcome of the Commission’s pending proceeding examining the rules relating to high-cost universal service support in competitive areas could potentially impact, among other things, the support that competitive ETCs may receive in the future. *As such, we recognize that any grant of competitive ETC status pending completion of that proceeding will be subject to whatever rules are established in the future.* We intend to proceed as expeditiously as possible to address the important and comprehensive issues that are being raised.<sup>51</sup>

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<sup>48</sup> *CSRA Cablevision, Inc.*, 47 FCC 2d 572 at ¶ 6 (1974) (“Under the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.”).

<sup>49</sup> *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264 (2000) (“*Twelfth Report and Order*”).

<sup>50</sup> See *RCC Order* at n.27.

<sup>51</sup> *In the Matter of the Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, 2003 FCC Lexis 3915 at ¶ 34 (emphasis supplied) (“*Competitive ETC Order*”).

OPASTCO and other commenters raise the specter of imminent ballooning of the Universal Service Fund as grounds for a stay, asserting that if Nextel Partners is granted ETC designation in New York, then all CMRS providers everywhere will seek and obtain ETC designation.<sup>52</sup> OPASTCO estimates that if all CMRS providers nationwide were to apply for and receive ETC status, the annual funding level of the High-Cost program would increase by approximately \$2 billion.”<sup>53</sup> However, OPASTCO provides no evidence demonstrating that all CMRS providers intend to be designated as ETCs.<sup>54</sup> In fact, there has been no flood of wireline ETC petitioners and there is no reason to assume that wireless carriers will act differently by seeking to obtain ETC designation *en masse*.

A review of the data reveals that it is the rural ILECs that are responsible for the growth of the fund. Wireless ETCs received less than \$1.5 million in high cost support in 2000, where as the rural LECs received almost \$2.03 billion in high cost support in that same year.<sup>55</sup> Assuming a highly optimistic growth projection, wireless ETC funding would rise to, at most, approximately \$102 million in 2003, compared to the

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<sup>52</sup> See OPASTCO Comments at 2-3; see NYSTA Comments at 11.

<sup>53</sup> OPASTCO Comments at 3.

<sup>54</sup> Nextel Partners’ primary business focus is the provision of services in mid-sized and tertiary markets. This business focus makes Nextel Partners a natural and high-priority candidate for ETC designation. But not every CMRS carrier is interested in pursuing an active course of providing the required services for ETC designation and building out a network in high-cost areas. There is no reason to believe that wireless ETCs pose any greater risk than wireline ETCs to the survival of the Universal Service Fund.

<sup>55</sup> See Reply Comments of CTIA, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (June 3, 2002) at 3.

approximately \$3.2 billion in high cost funding that rural LECs will receive during the same time period.<sup>56</sup>

Moreover, in developing support mechanisms, the Commission was aware that the Universal Service Fund would grow as competitive ETCs entered the market, and the Commission adopted mechanisms that would allow for adjustment over time.<sup>57</sup> The funding<sup>58</sup> and all of the core services<sup>59</sup> were discussed in length, reviewed by the Joint Board, reconsidered in the recent Order and Order on Reconsideration<sup>60</sup> and, in some cases, litigated.<sup>61</sup> In establishing the funding mechanisms, the Commission struck a balance between the concerns of all types of parties and carriers, including consideration of issues involving wireless ETC designation.<sup>62</sup> To prevent designation of competitive

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<sup>56</sup> See *id.*

<sup>57</sup> See *MAG Order* at ¶ 11 (“The plan adopted today will provide certainty and stability for rural carriers for the next five years, enabling them to continue to provide supported services at affordable rates to American consumers. While we take an important step today on rural universal service reform, our task is not done. Our universal service rules cannot remain static in a dynamic marketplace. As we move forward, we will continue to refine our policies to preserve and advance universal service, consistent with the mandates in section 254.”); see also *In the Matter of Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 18 FCC Rcd 2932, ¶ 84 (2003) (wherein the Commission is already working to address anticipated future growth in the USF resulting from the entry of additional wireless ETCs during the next several years.).

<sup>58</sup> See, e.g., *In the Matter of Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20452, ¶ 90 (1999) (discussing support of second lines and the lines of non-ILEC ETCs).

<sup>59</sup> See *Competitive ETC Order* at ¶ 7.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., *Alenco Communications*.

<sup>62</sup> See *MAG Order* at ¶ 17 (“The Recommendation represents the consensus of individual Rural Task Force members, who work for a broad range of interested parties, often with competing interests, including rural telephone companies, competitive local exchange carriers, interexchange carriers, wireless providers, consumer advocates, and

ETCs as we move into the implementation phase of these decisions is troubling at best, and antithetical to the underlying purposes of the Act.<sup>63</sup> After the ILECs fought to increase the amount of funding to support embedded costs,<sup>64</sup> they are now using the size of the fund as an argument to prevent the entry of competitors.<sup>65</sup>

### **Conclusion**

In sum, all applicable legal and public interest requirements for designation of Nextel Partners as an Eligible Telecommunications Carrier have been satisfied. Accordingly, Nextel Partners requests that the Commission promptly grant its Petition for Designation as an Eligible Telecommunications Carrier in the State of New York.

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state and federal government agencies”), ¶ 178 (“All telecommunications carriers, including commercial mobile radio service (CMRS) carriers that provide supported services, regardless of the technology used, may be eligible to receive federal universal service support”), and ¶ 180 (“we adopt the Rural Task Force’s recommendation that a wireless mobile carrier use a customer’s location ... for purposes of receiving high-cost universal service support”).

<sup>63</sup> See *Alenco Communications* at 619.

<sup>64</sup> See *MAG Order* at ¶¶ 6-8.

<sup>65</sup> In non-rural study areas, the OPASTCO’s anticompetitive “ballooning” argument, which OPASTCO has attempted to cloak in the guise of a “public interest” concern over the size of the fund, is irrelevant since no public interest determination is warranted under the Act for non-rural study areas.

Respectfully submitted,

NPCR, Inc. d/b/a Nextel Partners

By           [signed]            
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Counsel for Nextel Partners

Date: September 2, 2003

**EXHIBIT 1**

**RTC Study Areas Withdrawn**

150081	Citizens Hammond NY	150092	Edwards Tel. Co.
150099	Hancock Tel. Co.	150104	Margaretville Tel. Co.
150128	Frontier Sylvan Lake	150135	Warwick Valley NY
154533	Citizens Red Hook	154534	Citizens West Cnty



## **EXHIBIT 2**

### **Revised List of Verizon Wire Centers for Which Designation is Requested**

AKRNNYAK	CHTGNYZH	DLSNNYDL	HDSNNYHD
ALBNNYAI	CHVYNYZV	DNKRNYDK	HLLDNYHO
ALBYNYGD	CICRNYCJ	DNMRNYDN	HLLYNYHE
ALBYNYSS	CLAYNYOS	DRBYNYDB	HMBGNYHB
ALBYNYWA	CLCTNYCC	DVPTNYDT	HMTNNYHA
ALDNNYAD	CLEVNYCE	EAURNYEA	HNDLNYHI
ALMTNYAL	CLNCNYBA	EDENNYED	HNTRNYHN
AMBRNYAB	CLPKNYCP	EDTNNYET	HOMRNYHM
AMHRNYMP	CLTNNYZI	EGLVNYGL	HRFRNYHR
AMSTNYPE	CLVLNYCK	EGNBNYEG	HRKMNYHC
ANGLNYAO	CLVRNYCV	ELBANYEB	HRNLNYHL
ARCDNYAE	CLYDNYCY	ELCVNYEV	HRVLNYHV
ARGYNYAY	CMBRNYCM	ELDPNYEU	HRWKNYHW
ARPTNYAR	CMDNNYZM	EMIRNYEM	HSFLNYHS
ATTCNYAT	CMLSNYID	ENDCNYEN	HSHDNYHH
AUBNNYAU	CMLSNYON	ESPRNYER	ILINNYIL
AVOCNYAC	CMPBNYCP	EVMLNYEI	ITHCNYIH
AVPKNYAV	CNBRNYCD	FABSNYFB	ITHCNYPG
AXBANYAX	CNSRNYCX	FRHDNYFH	JAVANYJA
BALSNYBA	CNSTNYZA	FSVLNYFL	JHCYNYJC
BATHNYBH	CNTNNYZO	FTANNYFA	JNVLNYJV
BATVNYBT	CNTTNYCI	FYTTNYFY	JRDNNYJD
BAVLNYBV	CPNHNYZP	FYVLNYFV	KENDNYKD
BGFLNYBF	CPTWNYZW	GDISNYGI	KTBANYKB
BLLNNYBG	CRLDNYCR	GENVNYGN	LCPTNYLK
BLRVNYBC	CRNGNYCG	GLFLNYGF	LFRVNYLE
BNGHNYHY	CRTHNYZG	GLWYNYGW	LFYTNYLF
BNGHNYRO	CSTNNYCS	GNWCNYGW	LKGRNYLR
BNVDNYBD	CTBRNYCB	GRCTNYGC	LKPCNYLA
BRKRNYBK	CTNGNYCH	GRTNNYGT	LNCSNYLC
BRPTNYBP	CTONNYZN	GRVGNYGV	LNNGNYLG
BSTNNYBN	CTRGNYSO	GRVINYGE	LSTNNYLW
BYRNNYBY	CTSKNYCT	GSPTNYGP	LTFLNYLS
CAIRNYCA	CUBANYEM	GVRNNYGO	LTHMNYTS
CBLSNYZB	CYTNNYZY	GWNDNYGD	LTVYNYLI
CHCKNYCE	DLGVNYDG	HBRTNYHZ	LYNSNYLY
CHKTNYFR	DLMRNYDA	HDFLNYMS	MACDNYMC

MAINNYME	PHMTNYPM	SYRCNYSA
MALNNYMM	PLBGNYPB	SYRCNYSU
MARNNYMR	PLMYNYPY	TCNDNYTI
MARVNYMV	PLVLNYPL	THRSNYTH
MCDGNYMD	PNYNNYPN	TLLYNYTY
MCGRNYMG	PPRGNYPP	TNWNNYTW
MCHVNYMC	PRISNYPA	TROYNY03
MCLNNYMZ	PRTVNYPV	TROYNY04
MDPTNYMP	PRVINYPR	UNSPNYUS
MEDNNYPA	PTSDNYPS	UTICNYUT
MEXCNYMX	PTTWNYPY	VLFLNYVF
MINONYMI	RCSPNYRS	VRBGNYVB
MLFRNYMU	RCVLNYRH	VRHVNYVR
MOIRNYMY	RDCKNYRC	WDPTNYWT
MORVNYMO	RNLKNYRL	WERLNYWL
MRTWNYMW	ROMENYRM	WHBONYWP
MSSNNYMQ	RSVLNYRV	WHTHNYUH
NCHLNYNL	RXBYNYRX	WLBONYUB
NCLNNYNO	SALKNYQT	WLCTNYWC
NGFLNY76	SAVNNYSN	WLSNNYME
NGFLNYPO	SBTHNYSB	WLVLNYNM
NGFLNYWO	SCHNNYSC	WMSNNYWN
NGRNNYNG	SCHRNQYH	WNHMNYWM
NROSNYNR	SCHVNYQN	WNKHNYWK
NSYRNYSN	SHSPNYQS	WRBGNYWU
NWFDNYNF	SHVLNYSV	WRCSNYUC
NWFNNYMA	SKNTNYSE	WSNCNYUN
NWRKNYNK	SLCKNYSI	WSVLNYNC
OKFDNYOK	SLMNNYWW	WTGLNYWG
OKHLNYOH	SMFRNYQM	WTPTNYWR
OLENNYHA	SNFLNYSL	WTRLNYWT
ONEDNYOD	SODSNYSD	WTTWNYUN
ONNTNYOA	SPVLNYWM	WVRLNYWV
ONTRNYON	SRLKNYQL	WWVLNYWW
ORPKNYST	SRSPNYSR	YNTWNYYT
OSWGNYOS	SSCHNYSO	
OTEGNYOT	SYBHNYQY	
OWEGNYOW	SYRCNYDD	
OWSCNYOO	SYRCNYEP	
PERUNYPE	SYRCNYGS	
PHLANYPF	SYRCNYJS	

## **CERTIFICATE OF SERVICE**

The undersigned, an attorney in the law firm of Catalano & Plache, PLLC hereby certifies that on this second day of September, 2003, a true and correct photocopy of the foregoing "Reply Comments" was sent, via US First Class Mail, postage prepaid, to the following persons:

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